COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-008-D
(2012-CA-941-MR)

LARRY O'NEIL THOMAS, as Administrator of
the Estate of JAMES "MILFORD" GRAY, deceased, and
all lawful survivors of JAMES "MILFORD" GRAY, deceased — APPELLEES

On Appeal From Fayette Circuit Court
v. Hon. Pamela R. Goodwine, Circuit Judge
Civil Action No. 00-CI-1364

SAINT JOSEPH HEALTHCARE, INC.,
d/b/a SAINT JOSEPH HOSPITAL — APPELLANT

BRIEF OF APPELLANT SAINT JOSEPH HEALTHCARE, INC.

Respectfully submitted,

Robert F. Duncan
Jay E. Ingle
Patrick F. Estill
Jackson Kelly PLLC
175 East Main Street, Suite 500
Lexington, KY 40507
(859) 255-9500

CERTIFICATE OF SERVICE

I hereby certify that the record on appeal was not withdrawn and that a copy of this Brief has been served by mailing a true and correct copy of same to to Honorable Pamela R. Goodwine, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 North Limestone, Lexington, Kentucky 40507; Samuel P. Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Darryl L. Lewis, Searcy Denny Scarola Barnhart & Shipley, P.A., Post Office Drawer 3626, West Palm Beach, Florida 33402-3626; Charles A. Grundy, Jr., Grundy Law Group, 3270 Blazer Pkwy, Ste 102, Lexington, Kentucky 40509-2115; and Elizabeth R. Seif, DeCamp & Talbott, P.S.C., National City Plaza, 301 East Main Street, Suite 600, Lexington, Kentucky 40507;on this the 10th day of November, 2014.

Counsel for Appellant
Saint Joseph HealthCare, Inc.

INTRODUCTION

This is a medical negligence case against Saint Joseph HealthCare, Inc. d/b/a Saint Joseph Hospital (hereinafter "Saint Joseph") in which a new trial on punitive damages yielded a result almost identical to the result previously held unconstitutional by the Court of Appeals.

Saint Joseph appeals on grounds that it was entitled to judgment as a matter of law on the Plaintiff's claims for punitive damages. In the alternative, Saint Joseph appeals the Trial Court's order overruling its motion for new trial.

STATEMENT CONCERNING ORAL ARGUMENT

Saint Joseph respectfully requests that this Court hold oral arguments on this matter. Given the lengthy and complicated nature of the proceedings, coupled with the questions of law raised herein, Saint Joseph believes that oral argument would assist the Court in deciding the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case has had a long path. Its lengthy history includes three trials and three opinions by the Court of Appeals. This is an appeal of the latest opinion ("2013 Opinion"), which affirmed a punitive damages result nearly identical to one previously held unconstitutional. The latest trial resulted in an award of $1,450,000, a 387 to 1 ratio when compared to the compensatory damages of only $3,750. The prior award of $1,500,000—a ratio of 400 to 1—was called "clearly excessive" by the Court of Appeals in its 2008 Opinion.[1] Yet, in 2013 the Court of Appeals affirmed the award of $1,450,000.

This medical malpractice case arises out of the care and treatment of James "Milford" Gray by various healthcare professionals at the emergency department of Saint Joseph Hospital in 1999. Many of the facts of the case are found in the medical records and are summarized as follows. Mr. Gray came to Saint Joseph on April 8, 1999, and was examined by Dr. Barry Parsley and physicians' assistant Julia Adkins. He was discharged around midnight in stable condition. Upon discharge, Rural Metro Ambulance attempted to take Mr. Gray home, but could not find any family member who would accept him. (M. Jackson depo, pp. 5-6). Mr. Gray was returned to Saint Joseph, who provided him free lodging at the Kentucky Inn.

Early in the morning of April 9, 1999, Mr. Gray returned to Saint Joseph around 5:00 a.m., where he was examined by Dr. Parsley and Dr. Jack Geren and discharged in what the physicians believed was stable condition. A Saint Joseph social worker, Pam Blackwell, spent several hours assisting Mr. Gray with placement, and he eventually left Saint Joseph around noon. Mr. Gray unfortunately passed away later that afternoon. His autopsy report

---

[1] *Thomas, et al. v. St. Joseph Healthcare, Inc.*, Nos. 2007-CA-001192-MR & 2007-CA-0012440-MR (Ky. App. 2008) (attached as A-3).

listed a perforated peptic ulcer as the cause of death and showed certain unprescribed controlled substances in his system.

The Estate of Mr. Gray commenced this action alleging medical negligence against Saint Joseph; Dr. Richardson; Dr. Parsley; Dr. Geren; Julia Adkins, P.A.; and three Saint Joseph nurses. In addition to the traditional tort claims of medical negligence, the Plaintiff also alleged that Saint Joseph violated EMTALA.[2] (RA: 1.) Prior to trial, Saint Joseph's Motion for Summary Judgment on the issue of vicarious liability was granted, and Drs. Richardson, Parsley, and Geren were held not to be Saint Joseph's agents as a matter of law. (RA: 1997.)

After a mistrial in the first trial of this action, the case proceeded to trial on November 7, 2005. On the morning of trial, the Estate settled with co-defendants Dr. Richardson, Dr. Parsley, and Dr. Geren. The trial then commenced and the jury returned a verdict in favor of the Plaintiff. (RA: 3064-3072.) The jury apportioned fault as follows: 25% to the Plaintiff, 30% to Dr. Parsley, 30% to Dr. Geren, and 15% to Saint Joseph. (*Id.*) The jury awarded $25,000 in compensatory damages, making Saint Joseph's share $3,750; and $1,500,000 in punitive damages, which was wholly assessed against Saint Joseph. (*Id.*)

The trial court granted Saint Joseph's Motion for New Trial, but overruled its Motion for Judgment Notwithstanding the Verdict ("JNOV"). (RA: 3397.) In its 2008 Opinion, the Court of Appeals affirmed the Fayette Circuit Court "in all respects except for the award of punitive damages," and remanded the matter for a new trial on punitive damages. (2008 Opinion at 34-35). Among other things, the Court of Appeals applied *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2002) and *BMW of North America, Inc. v.*

---

[2] Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.

Gore, 517 U.S. 559 (1996), to find that the punitive damages award was "clearly arbitrary and excessive" due to the "enormous" disparity between the compensatory and punitive damage awards. (*Id.*)[3]

This case returned to the Fayette Circuit Court for a new trial on punitive damages, which commenced on February 6, 2012. The trial was riddled with confusion from the beginning, as issues regarding ratification, the interplay of negligence and EMTALA, and the role of the physicians was constantly the subject of bench conferences and objections. At the close of Plaintiff's case, Saint Joseph moved for a directed verdict, arguing that the Plaintiff had not produced sufficient evidence of gross negligence and ratification to warrant an instruction on punitive damages. (22/4/12/CD/24-12 at 3:10:16; *see also* RA: 3708.) Saint Joseph renewed the motion after the conclusion of its case. (22/4/12/CD/24-21 at 4:58:20.) The Trial Court denied the motions and allowed the case to be considered by the jury.

On February 29, 2012, the jury returned a verdict in favor of the Plaintiff and granted an award of punitive damages in the amount of $1,450,000, which was 386 times greater than the compensatory damages assigned to Saint Joseph. (RA: 3851.) Saint Joseph timely filed a Motion for JNOV on grounds of insufficient evidence of gross negligence and ratification, and a Motion for New Trial on grounds of an error of law in instructing the jury to consider the doctors as agents of Saint Joseph, juror misconduct, and violation of due process because the award was arbitrary and excessive. (RA: 3859-3885.) The Trial Court denied both motions. Despite criticizing the prior trial court judge for failing to perform a *Gore/Campbell*

---

[3] This Court granted Saint Joseph's motion for discretionary review of the 2008 Opinion based on issues related to its motions for directed verdict. This Court simultaneously remanded the action to the Court of Appeals for reconsideration in light of its EMTALA opinion in *Martin v. Ohio County Hospital Corp.*, 295 S.W.3d 104 (Ky. 2009). The Court of Appeals rendered its second opinion in this case on July 16, 2010, addressing issues concerning EMTALA and reaffirming the 2008 Opinion with regard to punitive damages. *See Thomas, et al. v. St. Joseph Healthcare, Inc.*, No. 2007-CA-001192-MR, *on remand from* No. 2009-SC-000006-DG (Ky. App. 2010) (Attached as A-4).

analysis, and even assuring the parties in a pre-trial conference that "I will make the analysis that I think should have been made the first time under *Campbell* and *Gore*," the Trial Court failed to perform the analysis at all. (22/4/11/CD/20 at 3:26:30.) The Trial Court stated, "I don't know that [the *Gore/Campbell* analysis] is required given the correctness of the jury instructions." (22/4/11/CD/171 at 4:20:20.)

The Court of Appeals rendered its most recent Opinion on December 6, 2013, affirming the verdict and judgment by a 2-1 vote.[4] In Judge Nickell's dissent, he disagreed with the majority's analysis of excessiveness and found the award to be "grossly excessive" and violative of the Due Process Clause of the Fourteenth Amendment. (2013 Opinion at 36). Judge Nickell stated that he would "remand with instructions for entry of an award of punitive damages in an amount of no more than $33,750, which would represent a constitutionally sound single-digit ratio of 9:1." (*Id.*)

STANDARD OF REVIEW[5]

Appellate courts "review a trial court's refusal to direct a verdict under a clear error standard." *Aesthetics in Jewelry, Inc. v. Brown, ex rel. coexecutors*, 339 S.W.3d 489, 495 (Ky. App. 2011) (*citing Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256 (Ky. App. 2007)). This court may reverse the denial of a directed verdict or JNOV "if it determines, after reviewing the evidence in favor of the prevailing party, that the verdict is palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *Id.*

---

4 2013 Opinion, attached as A-5.

5 In the present case, the standard of review is of paramount importance. For example, the Circuit Court gave unfettered deference to the jury's finding when considering the constitutional excessiveness arguments, despite clear direction that such review is *de novo*. *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 298 (Ky. App. 2009); *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 931 (Ky. 2007).

Questions of law are reviewed *de novo*. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 779 (Ky. App. 2007); *see also Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 450 (Ky. App. 2006) ("Appellate review of jury instructions is a matter of law, and, thus, *de novo*."). Whether Drs. Parsley and Geren can be considered agents of Saint Joseph for purposes of KRS 411.184(3) is a question of law, and therefore, the Court must review this question *de novo*.

Questions regarding juror misconduct are reviewed "for clear error." *Graham v. Com.*, 319 S.W.3d 331, 337 (Ky. 2010), as modified (Sept. 10, 2010).

Finally, "[t]he standard of review of the constitutionality of punitive damages is *de novo*." *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 298 (Ky. App. 2009) (*citing Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920, 931 (Ky. 2007)). "This review is guided primarily by *BMW of North America, Inc. v. Gore,* and its progeny." *Id.* Therefore, in analyzing the award of punitive damages *de novo*, no deference should be given to the jury, the Trial Court, or the Court of Appeals.

ARGUMENT

The issues presently before the Court are as follows. First, Saint Joseph is entitled to judgment because (A) undisputed evidence presented at trial established that Saint Joseph provided more than slight care to Mr. Gray, and (B) the Plaintiff did not present sufficient evidence to prove the requisite element of ratification as required by KRS 411.184(3).

Second, should this Court find that Saint Joseph is not entitled to judgment, Saint Joseph is entitled to a new trial because (A) the Trial Court erroneously instructed the jury that Drs. Parsley and Geren were agents of Saint Joseph for purposes of awarding punitive damages; (B) the Trial Court failed to dismiss a juror, and therefore violated Saint Joseph's right to a fair trial, after the Trial Court itself notified counsel that the juror gave a false

answer during *voir dire* and slept throughout the presentation of evidence; and (C) the punitive award is arbitrary and excessive and violates Saint Joseph's constitutional right to due process.

I. SAINT JOSEPH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. AN AWARD OF PUNITIVE DAMAGES WAS FLAGRANTLY AGAINST THE EVIDENCE PRESENTED AT TRIAL.

Saint Joseph preserved this issue for review in its motion for directed verdict at the close of Plaintiff's case (22/4/12/CD/24-12 at 3:10:16; *see also* RA: 3708.), which it renewed after the conclusion of all proof. (22/4/12/CD/24-21 at 4:58:20.) Saint Joseph also timely filed a Motion for JNOV. (RA: 3859-3885.)

Kentucky Courts have "defined gross negligence as being something more than the failure to exercise slight care … there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful." *Cooper v. Barth*, 464 S.W.2d 233, 235 (Ky. 1971); *see also Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC,* 277 S.W.3d 255, 268 (Ky. App. 2008) (defining gross negligence as "a finding of a failure to exercise even slight care such as to demonstrate a wanton or reckless disregard for the rights of others."); *Williams v. Wilson.* 972 S.W.2d 260, 263 (Ky. 1998) ("The absence of slight care in the management of a railroad train is gross negligence." (quoting *Louisville & Nashville R.R. v. Kelly's* Adm'x, 38 S.W. 852, 854 (1897))).

Against this backdrop, the Court must review the evidence presented to the jury to determine if the verdict is "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *Brown*, 339 S.W.3d at 495. Given the undisputed evidence of all the medical services Saint Joseph provided to Mr. Gray, a

determination by the jury that Saint Joseph failed to exercise even slight care is "flagrantly" against the evidence, especially in light of the requirement that such a finding by the jury must be made based on clear and convincing evidence. KRS 411.184(2).

It was undisputed at trial that Saint Joseph provided extensive services to Mr. Gray. The following facts were all established and undisputed at trial[6]:

- Mr. Gray was in the Saint Joseph Emergency Department for over four and one-half hours during his visit beginning at 8:08 p.m. on April 8, 1999 (the "April 8 Visit"). Mr. Gray was cared for by a board certified emergency physician, a physician's assistant, and at least four licensed nurses. The following care was provided to Mr. Gray:
  - Mr. Gray was seen by the triage nurse, Jane Sibley, upon arrival, who recorded his complaints, medical history, and vital signs, including temperature, pulse, respiratory rate, and blood pressure.
  - Mr. Gray was evaluated by a treatment nurse, Laura Bills, following triage, who conducted a "focal assessment," which included assessment of his skin color, condition and turgor; mental status; cognitive and perceptual level; psychosocial status; stress level; respiratory system; genitourinary system; and musculoskeletal system.
  - Mr. Gray was evaluated by physician's assistant Julia Adkins, who performed a review of systems and performed a physical examination which included evaluation of Mr. Gray's general appearance, vital signs, head, eyes, ears, nose, throat, neck, neurological system, cardiac system, respiratory system, musculoskeletal system, abdomen and skin.
  - Mr. Gray was also evaluated by Dr. Parsley, who performed the same review of systems and physical examination as Ms. Adkins.
  - Dr. Parsley and Ms. Adkins ordered laboratory studies, including complete blood count, a complete metabolic panel, amylase, and lipase. After Mr. Gray initially refused the laboratory studies, health care providers spoke with Mr. Gray and convinced him to consent to having the laboratory studies performed.
  - Three x-rays were taken of Mr. Gray's abdomen.
  - Mr. Gray was provided Stadol for pain relief and Phenergan for potential nausea.

---

[6] All of the facts were established in the medical records unless specifically noted with cite to trial testimony.

- Nurse Frieda Howard performed a soaps suds enema and manual disimpaction of stool for Mr. Gray.

- Dr. Parsley and Ms. Adkins reached a medical diagnosis for Mr. Gray of abdominal pain and constipation.

- Mr. Gray was in the Saint Joseph Emergency Department for six hours and fifty minutes during his visit beginning at 5:25 a.m. on April 9, 1999 (the "April 9 Visit"). Mr. Gray was cared for by two board certified emergency physicians, at least four licensed nurses, at least one nursing assistant, and a licensed social worker. The following care was provided:

  - Mr. Gray was seen by the triage nurse, Tish Cobb, upon arrival, who recorded his complaints, medical history, vital signs, including temperature, pulse, respiratory rate, and blood pressure.

  - Mr. Gray was evaluated by a treatment nurse, Linda Bingham, following triage, who provided another focal assessment.

  - Mr. Gray was evaluated by Dr. Parsley, who performed a review of systems and performed a physical examination which included evaluation of Mr. Gray's general appearance, vital signs, head, eyes, ears, nose, throat, neck, neurological system, cardiac system, respiratory system, musculoskeletal system, abdomen and skin. Mr. Gray was again assessed by Dr. Geren when he came on shift at 7:00 a.m.

  - Dr. Parsley ordered laboratory studies, including complete blood count, a complete metabolic panel and amylase.

  - An upright chest x-ray was taken to evaluate Mr. Gray's abdomen.

  - A nasogastric tube was ordered and placed into Mr. Gray's stomach to evaluate and assess whether there was any active bleeding.

  - Mr. Gray was provided Stadol for pain relief and Phenergan for potential nausea.

  - Nursing assistant Vicki Robertson cleaned Mr. Gray, including cleaning feces.

  - Nurse Nancy Hicks brought Mr. Gray's condition to the attention of Dr. Geren at least two times. (Previous Trial Testimony Played into 2/6/12 Trial, Vol. 1 of 1, Dr. Geren at 16:34:10.)

  - Dr. Geren reassessed Mr. Gray at least three or four times. (*Id.* at 16:43:15.)

  - Dr. Geren reached a medical diagnosis for Mr. Gray of acute gastritis with hemorrhage and discharged Mr. Gray in what he thought was stable condition.

- A social worker, Pam Blackwell, spent at least two hours with Mr. Gray trying to assist him in finding somewhere to go after discharge. (22/4/12/CD/24-16 at 10:03:02.)

- Ms. Blackwell called at least four resources and three family members in attempting to assist Mr. Gray. (*Id.* at 10:08:00 – 10:18:20.)

- Mr. Gray was provided a prescription voucher to allow him to obtain his prescriptions free of charge and was provided a taxi voucher for transportation free of charge.

(Medical Records, Df. Ex. Vol. 3, Ex. 14.)

In addition to these undisputed facts, the Trial Court as a matter of law found that Saint Joseph satisfied its obligation to provide a medical screening examination and granted Saint Joseph summary judgment on that portion of the Plaintiff's EMTALA claim.[7] (RA: 1997.) In doing so, the Trial Court necessarily found that Saint Joseph attempted to diagnose and treat Mr. Gray. Those steps alone rise above the type of conduct that can be considered reckless indifference or the failure to exercise even slight care. A misdiagnosis by a physician actually establishes that the goals and purposes of EMTALA's screening requirement have been met. *See Vickers v. Nash General Hospital, Inc.*, 78 F.3d 139, 144 (4th Cir. 1996) ("[W]hen an exercise in medical judgment produces a given diagnosis, the decision to prescribe a treatment responding to the diagnosis cannot form the basis of an EMTALA claim of inappropriate screening. In fact, not only does treatment based on diagnostic medical judgment not violate the Act, it is precisely what EMTALA hoped to achieve[.]").

The jury was required to find by clear and convincing evidence that Saint Joseph failed to exercise even slight care for Mr. Gray. While a jury could find that the nurses may

---

[7] EMTALA generally imposes two duties on the hospital: (1) to provide an appropriate medical screening to individuals who come to Saint Joseph's emergency department seeking medical treatment, and (2) if Saint Joseph determines that the individual has an emergency medical condition, to stabilize the patient before transferring or discharging the patient. *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir. 1990). Prior to trial, the Trial Court held as a matter of law that Saint Joseph satisfied the first duty (medical screening), and the case proceeded to trial only on the second duty.

have failed to follow certain Hospital policies, the doctors may have misdiagnosed Mr. Gray's condition, or Mr. Gray may not have truly been in stable condition when he was discharged, it was flagrantly against the evidence for a jury to conclude that not even slight efforts were undertaken to provide care to Mr. Gray.

B. THE PLAINTIFF DID NOT PRESENT SUFFICIENT EVIDENCE AS A MATTER OF LAW TO PROVE THE REQUISITE ELEMENT OF RATIFICATION.

Saint Joseph preserved this issue for review in its motion for directed verdict at the close of Plaintiff's case, (22/4/12/CD/24-12 at 3:10:16; *see also* RA: 3708.), which it renewed after the conclusion of all proof. (22/4/12/CD/24-21 at 4:58:20.) Saint Joseph also timely filed a Motion for JNOV. (RA: 3859-3885.)

Kentucky law requires a Plaintiff to prove that an employer such as Saint Joseph anticipated, authorized, or ratified the actions of its employees in order for punitive damages to be assessed. KRS 411.184(3). This burden is intended to be a high one: "*In no case*" should punitive damages be assessed unless the requirements of the statute are met. KRS 411.184(3) (emphasis added). Kentucky's ratification statute is acknowledged to be one of the strictest standards in the country. *Berrier v. Bizer*, 57 S.W.3d 271, 283 (Ky. 2001) ("Kentucky is the only state with a statute that so broadly limits vicarious liability for punitive damages."). While Saint Joseph's post-trial motions were pending, this Court made final its most comprehensive analysis yet of what is required by KRS 411.184(3). *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W. 3d 783 (Ky. 2011). *Beglin* is directly on point, holding that there must be sufficient evidence of after-the-fact approval by the hospital; yet, the Trial Court and Court of Appeals ignored this Court's directive. This case is analogous to *Beglin*, and is "precisely the sort of circumstances under which KRS 411.184(3) is intended to shield an employer from punitive damages. *Beglin*, 375 S.W.3d at 794.

It is the duty of the court to remove issues from the jury when evidence is insufficient. *Hannin v. Driver*, 394 S.W.2d 750, 751 (Ky. 1965). The Trial Court ignored its duty in this case. Within two minutes of receiving Saint Joseph's written Motion for Directed Verdict and supporting Memorandum, and without even hearing any arguments, the Trial Court stated that it was "inclined to overrule the motion." (22/4/12/CD/24-12 at 3:12:47; *see also* RA: 3708.) In addressing Saint Joseph's Motion for JNOV, the Trial Court could not identify any competent evidence establishing ratification, yet still refused to enter judgment in Saint Joseph's favor. When asked by Saint Joseph what evidence the Court believed constituted ratification, the Trial Court had no answer. (12/4/12/CD/73 at 3:59:00.) The Trial Court justified its extended pause by stating, "I was getting ready to say what I believe the jury considered, which is improper. *I don't know what the jury considered* other than to say they considered the evidence presented." (*Id.* at 3:59:40.) (emphasis added). Counsel for Saint Joseph reminded the Trial Court that the "whole purpose of a Motion for [JNOV]" is for the court to "make sure that some evidence that came before the jury can justify this verdict." (*Id.* at 4:59:50.)

1. The Trial Court and Court of Appeals misinterpreted and misapplied this Court's instructions in *Beglin*.

The Trial Court misconstrued the concept of ratification throughout the case. Despite the clear law in Kentucky that ratification must be explicit and after the fact, the Trial Court considered this too high of a standard and refused to apply it. The Trial Court held that ratification could be inferred or implicit, explaining, "there has to be some kind of action that's taken where that is inferred from that explicit act, because there's never going to be an explicit pronouncement of ratification of wrongdoing." (12/4/12/CD/73 at 4:02:25.) Further, in its review, the Court of Appeals stated plainly that it did "not read *Beglin* as requiring that

a defendant explicitly approved or ratified the conduct in question." (2013 Opinion at 12.) Yet, this is exactly what *Beglin* requires. *Beglin*, 375 S.W. 3d at 794 (to ratify is "to approve or sanction *formally*") (emphasis added); *see also Wolford v. Nickels Bus Co.*, 257 S.W.2d 594, 596 (Ky. 1953) ("[I]t is essential that the ratification be explicit.") (citation omitted).

The Trial Court further confused the significance of "after-the-fact" approval. In the middle of trial, the Trial Court stated that for purposes of ratification, the evidence would be limited to what "occurred on the night that this treatment took place and what Saint Joseph's position was that evening as it related to Mr. Gray."[8] (22/4/12/CD/24-12 at 2:32:44.) In overruling Saint Joseph's motion for directed verdict, the Trial Court stated: "There has been evidence introduced or, at least, argument made that those policies were violated. And the question then becomes whether or not that in and of itself was ratification or evidence of ratification or the lack of anything occurring after that point." (*Id.* at 3:14:24.). However, violation of policies establishes just the opposite—that Saint Joseph did not approve of the conduct in question.

Notably, the Trial Court itself recognized its confusion and uncertainty regarding ratification, stating that it believed that one of the issues on appeal would be "the ratification issue" and that the appellate courts could possibly say that "there was no evidence of ratification" or that the Trial Court's "definition of ratification was incorrect." (12/4/12/CD/73 at 4:24:23.) On appeal, the Court of Appeals itself stated that "[t]he application of [*Beglin*] presents difficulties for the trial court *and for this court.*" (2013 Opinion at 12, 30.) (emphasis added.) The Courts' uncertainty led to key errors in the application of Kentucky law on ratification.

---

[8] Even the Plaintiff's counsel disagreed with the Trial Court, stating that "the case law does show that things that occur after that are relevant." (22/4/12/CD/24-12 at 2:33:38.)

2. The Plaintiff offered only two examples of alleged ratification, neither of which constitutes ratification under Kentucky law.

As far as after-the-fact conduct, the only arguments presented by the Plaintiff for ratification were (i) an alleged failure to properly investigate; and (ii) a theme that Saint Joseph ratified the conduct by continuing to defend itself in this lawsuit. Both are insufficient as a matter of law.

a. Proof of "formal" or "explicit" ratification is required.

Kentucky courts define ratification as "the affirmance of an act by one for or in behalf of another at a time when he had no authority to do the act for one in whose name it was done." *Stewart v. Mitchell's Adm'x*, 190 S.W.2d 660, 662 (Ky. 1945). *Stewart* further defined "affirmance" as a "manifestation of an election by one on whose account an unauthorized act has been performed to treat the act as authorized." *Id.* (quoting REST. OF AGENCY §83). Anything short of an affirmative act by an employer or principal to approve its employees' or agents' conduct is insufficient as a matter of law. Kentucky case is also clear that ratification by a principal must be explicit. *Beglin* at 794 (to ratify is "to approve or sanction *formally*") (emphasis added); *Wolford v. Nickels Bus Co.*, 257 S.W.2d 594, 596 (Ky. 1953) (to find "ratification by the principal of a tort of the agent it is essential that the ratification be explicit.") (citing 2 C.J.S. Agency §37(d) at 1076)).

During the hearing on Saint Joseph's Motion for JNOV, the Trial Court facially stated that the law required explicit ratification, and inferred that there was no evidence of an explicit ratification by Saint Joseph, but then applied a standard of implicit ratification because it believed there would never be an "explicit pronouncement." (12/4/12/CD/73 at 4:02:25.) The Trial Court's role is to apply the law, not to change it or create a different standard that it believes is better. *Owens v. Clemons*, 408 S.W.2d 642, 645 (Ky. 1966) ("It is

beyond the province of a court to vitiate an act of the legislature on the ground that the public policy therein promulgated is contrary to what the court considers to be in the public interest.").

Furthermore, the Court of Appeals apparently applied an implicit standard of ratification, looking for an "intention to ratify" that it could "infer from the facts and circumstances." (2013 Opinion at 12). Consistent with this idea of implicit ratification, the Court of Appeals stated that Saint Joseph did not point to "any other reasonable explanation other than intent to ratify or approve the actions of its emergency room staff." (2013 Opinion, at 13). As formal ratification is clearly required, the 2013 opinion would significantly and impermissibly lower the standard announced in *Beglin*. The Court of Appeals, confusingly, even pointed out the absence of any formal after-the-fact ratification: "This is not to say that the Hospital approved of the decision to discharge Gray[.]" (2013 Opinion at 14.) That statement alone establishes that there was no competent evidence of ratification.

b. Inadequate investigation cannot establish ratification.

The Court of Appeals noted that Saint Joseph "admitted that it did not conduct any investigation or review of the incident." (2013 Opinion at 13). Not only is that statement contrary to the evidence,[9] it is contrary to this Court's clear holding that inadequate investigation does not constitute ratification. In *Beglin*, the plaintiff made arguments similar to the Plaintiff's in this case, and those arguments were rejected. *Beglin* explicitly held that

[9] Plaintiff argued and apparently the Court of Appeals agreed that this case is distinguishable from *Beglin* because here there was no investigation. Plaintiff admits, however, that there was an investigation: Ms. Swinford, emergency department director, reviewed the chart and spoke to one of the treating physicians about Mr. Gray's care. (Court of Appeals Response Brief, p. 13.) While the Plaintiff may feel that was not a serious enough investigation, it was at minimum the beginning of an investigation, which brings the present case squarely under *Beglin*. Even if there was no investigation, however, neither the Plaintiff nor the Court of Appeals explains in any fashion why no investigation is any different than an inadequate investigation.

inadequate investigation does not constitute ratification. *Beglin*, 375 S.W. 3d at 794. This Court disagreed with the plaintiff's contention "that the poor quality of the investigation conducted by [the hospital] equates with ratification of the tortious conduct." *Id.* Rather, this Court explained that "the two concepts are quite distinct and we are not persuaded that [the hospital's] post-occurrence investigation amounts to approval of the conduct." *Id. See also Wolford*, 257 S.W.2d at 596 (holding that "ratification cannot be inferred from acts which may be readily explained without involving any intent to ratify.").

The Court of Appeals attempted to distinguish this case from *Beglin*, explaining that while in *Beglin* the hospital merely attempted to "distance itself from the conduct of its staff," Saint Joseph "consistently affirmed and approved [its staff's] actions." (2013 Opinion at 13.) First, the only evidence that Saint Joseph "consistently affirmed" its staff's actions is testimony during the trial of this matter, which is addressed in the next section as inappropriate to constitute ratification. Moreover, the hospital in *Beglin* did not just "distance itself" from its staff, but was accused of "*actively obstructing the investigation* by *concealing evidence* of the negligence." *Beglin*, 375 S.W.3d at 794 (emphasis added). Under the Court of Appeals' analysis, affirmatively concealing conduct after an incident would be rewarded over simply doing nothing post-incident.

While this result is certainly troubling, *simply doing nothing post-incident* was never sufficient to establish after-the-fact ratification in the first place. *Beglin* required "formal" rather than implicit post-incident ratification. *See Beglin*, 375 S.W.3d at 794. Failure to conduct an investigation is in no way "formally" approving or sanctioning conduct. *Id.* This Court's unambiguous directive that inadequate investigation cannot serve as grounds for ratification, in addition to the holding of *Wolford* that acts that can be explained without

intent to ratify are not evidence of ratification, establishes that evidence introduced regarding Saint Joseph's alleged inadequate investigation could not, as a matter of law, constitute ratification under KRS 411.184(3).

c. Saint Joseph's defense at trial cannot establish ratification.

Plaintiff argued at trial that Saint Joseph's continued defense in this case is evidence itself of ratification. Counsel for Plaintiff argued in his opening statement that the jury would hear that Saint Joseph believed "what they did was okay," and that such testimony established ratification. (22/4/12/CD/24-5 at 3:39:41.) Saint Joseph moved for a mistrial, but the Trial Court did not directly rule on the issue or admonish the jury. (*Id.* at 3:34:07.)

The question of whether ratification could be established by defending one's self at trial remained a recurring theme throughout trial.[10] Such an approach is problematic and cannot be considered as ratification because it would require Saint Joseph to admit that its nurses were grossly negligent in order to avoid a finding of ratification. While the Trial Court eventually mentioned that defense of the case was not evidence of ratification in the instructions, this does not cure the problem that the only arguments and evidence placed before the jury cannot, as matter of law, constitute ratification.

The argument that defense of a lawsuit could establish ratification was also raised by the plaintiff in *Beglin*. *See* Appellant's Brief, *University Medical Center, Inc. v. Beglin*, 2010 WL 5382400, *37 (Ky. 2010) (Nos. 2009-SC-000289, 2009-SC-000839.). Although this Court did not expressly acknowledge the argument in its opinion, it necessarily rejected such

---

[10] For example, Plaintiff attempted to prove ratification by questioning emergency department nursing supervisor Marilyn Swinford regarding the conduct of the nurses who cared for Mr. Gray. While Ms. Swinford was testifying, Plaintiff attempted to get Ms. Swinford to ratify any wrongdoing by the Saint Joseph nurses by asking whether she approved or condoned their conduct that morning. The testimony of Ms. Swinford could not, however, establish ratification of a grossly negligent act as she never testified that any act she witnessed constituted gross negligence.

an argument, as it found that there was insufficient evidence of ratification presented by the Plaintiff. There is no other Kentucky case directly on point for this issue. However, in a case almost identical to this one, the Supreme Court of Idaho specifically dismissed this argument:

> We are satisfied that . . . the hospital's defense at trial that the nurses did nothing wrong does not constitute sufficient evidence to support a finding of ratification. In addition to the lack of evidence indicating an intent to ratify, the plaintiffs' position, if adopted, would effectively require a principal to admit its agent's negligence or wrongdoing in every case to avoid a finding of ratification. Such a double-edged position is not sound policy.

Manning v. Twin Falls Clinic & Hospital, Inc., 830 P.2d 1185, 1191 (Id. 1992).

The Court of Appeals in its 2013 Opinion stated that Saint Joseph "approved of the actions of its staff" leading to Gray's discharge, and that Saint Joseph's position "goes well beyond merely defending against the negligence and EMTALA claims." (2013 Opinion at 14.) How the court arrived at these conclusions is not even minimally explained. The 2013 Opinion pointed out that Saint Joseph maintained the position "that its staff's actions were entirely appropriate under the circumstances," despite stating just one page earlier that a defendant should not be "placed in the untenable position of admitting to its agent's negligence or risking having its defense considered as a ratification." (2013 Opinion at 12) (citing *Beglin*, 375 S.W.3d at 796) (*Scott, J., dissenting*). The Plaintiff here did not and could not establish ratification through Saint Joseph's defense of its case at trial. To allow such evidence to establish ratification would effectively limit a principal's right to defend allegations of wrongdoing by its agents.

d. Plaintiff's negligence and gross negligence theory—that staff departed from Saint Joseph's policies—establishes that Saint Joseph did not approve or ratify the staff's conduct.

Plaintiff's theory of negligence and gross negligence is squarely contrary to a claim that Saint Joseph authorized or ratified the allegedly improper conduct. The Plaintiff's nursing expert's criticisms of Saint Joseph focused entirely on the failure of the nurses to follow hospital polices. (*See, e.g.*, Witness Testimony From 2/6/12 Trial, Vol. 1, Janice Rodgers Testimony at 9:44:15, 9:46:20, 9:46:48, 10:07:30, 10:22:00, 10:23:30, 10:38:00, and 10:40:50.)[11] Implicit in such a theory is that Saint Joseph, through its policies (*i.e.*, its expectations and prescribed course of conduct), *disapproved* of the alleged improper acts undertaken by its nurses.

This was exactly the situation in *Beglin*, in which this Court explained the interplay between the hospital's express policies and its ability to reasonably anticipate grossly negligent behavior. *Beglin*, 375 S.W.3d at 794 ("But for a gross deviation from well established duties and policies, this event would not have occurred. In light of the policies and training in place which should have prevented this event from happening, the hospital clearly could not have *reasonably* anticipated that its employees would fail to timely execute a mid-surgery order for blood.") (emphasis in original). Other courts have used the same analysis in holding that violation of policies is contrary to concepts such as authorization or ratification. *See e.g., In re Air Crash at Lexington, Kentucky August 27, 2006*, 2011 WL 350469 at *5 (E.D. Ky. Feb. 2, 2011) (Judge Forester) (holding that the overwhelming evidence that the pilots violated numerous policies, procedures, and protocols was contrary to a claim that Comair authorized or ratified the pilots' conduct).

[11] For example, Ms. Rodgers pointed out that nurses violated the standard of *care because they did not follow Saint Joseph's own policies*. She in fact made it clear through her testimony that Saint Joseph expected its nurses to follow those policies.

Like in *Beglin* and *In re Air Crash*, the Plaintiff in this case provided no evidence that Saint Joseph authorized, ratified, or should have anticipated the alleged improper conduct. The Trial Court thus erred in instructing the jury on ratification, and Saint Joseph was entitled to directed verdict.

II. SAINT JOSEPH IS ENTITLED TO A NEW TRIAL.

A. SAINT JOSEPH WAS WRONGLY PUNISHED FOR THE ACTS OF INDEPENDENT CONTRACTORS WHO WERE NOT ITS AGENTS AS A MATTER OF LAW.

This issue was preserved when Saint Joseph objected to the Court's instructions in these regards, (22/4/12/CD/24-22 at 9:29:53.), and subsequently moved for a new trial. (RA: 3859-3885.)

The Trial Court erroneously instructed the jury that Drs. Parsley and Geren were agents of Saint Joseph for purposes of assessing punitive damages under KRS 411.184(3). The court did so despite already ruling that Drs. Parsley and Geren were not agents of Saint Joseph, and that Saint Joseph could not be held vicariously liable for their actions. (RA: 1997.) The Trial Court had found that Drs. Parsley and Geren were not agents in part because the agreement between the doctors and Saint Joseph stated that Saint Joseph had "no control or direction over the matter, method, means, or independent medical judgment of [the doctors] in the performance of the services rendered to patients." (*See* RA: 1997; *id.* at 1194-1207.)

Throughout the trial the parties debated as to whether acts of Drs. Parsley and Geren could be considered by the jury in determining whether to assess punitive damages. The Trial Court ultimately included the following language in Instruction No. 1: "For purposes of EMTALA, doctors, as well as nurses and other employees of Saint Joseph, are agents of

Saint Joseph." (Jury Verdict, Instruction No. 1.) (emphasis added). There is little doubt that the jury considered the acts of the physicians in reaching its verdict, as it specifically inquired whether it could. After almost four hours of deliberations, the jury posed the following question to the Court: "Do we consider the doctors as well?" (22/4/12/CD/24-24 at 10:15:20.) In response, the Trial Court referred the jury to Instruction No. 1, which included the language above advising the jury that the doctors were agents of Saint Joseph. (*Id.*)[12] Instruction No. 1, however, should never have included that language. *C.f.*, *Reece*, 188 S.W.3d at 449 (stating that instructions "must properly and intelligibly state the law.").

1. A principal cannot be punished for the acts of a non-agent under Kentucky law.

Neither the Trial Court nor the Plaintiff could cite to a single case where a principal could be punished for the acts of persons that were not its agents or employees. (22/4/12/CD/24-23 at 5:06:58.) Further, the Court of Appeals could not point to any law that would support such a result. (2013 Opinion at 31) ("There is no Kentucky case law which addresses whether the Hospital may be liable for punitive damages based upon violations of the Act by physicians who are employed as independent contractors."). There is a reason for this: Kentucky agency law does not allow a person to be punished, vicariously, for the acts of a non-agent. Yet, in upholding the Trial Court's judgment, the Court of Appeals stretched the "purpose and scope of EMTALA" to create the fiction of an agency relationship for purposes of punitive damages. (2013 Opinion at 31.)

Under Kentucky law, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf *and subject to his control*, and consent by the other so to act." *Taylor v. Jewish Hosp. & St.*

---

[12] Saint Joseph objected to the Court's response to the juror question. (22/4/12/CD/24-24 at 10:15:20.)

Mary's Healthcare, Inc., 3:13-CV-00361-CRS, 2014 WL 2612550, at *10 (W.D. Ky. June 11, 2014) (quoting *McAlister v. Whitford,* 365 S.W.2d 317, 319 (Ky.1962)) (emphasis added). If, as in this case, there is no agency relationship as a matter of law, then there has been no such "manifestation of consent" by the principal to answer for the acts of the agent. Moreover, the agreement between Saint Joseph and the physicians expressly stated that Saint Joseph had "no control or direction over the matter, method, means, or independent medical judgment of [the doctors] in the performance of the services rendered to patients." (Agreement, ¶ 12, p.8., RA: 1194-1207.) Saint Joseph did not seek out the benefits of an agency relationship with the doctors, and it should not be punished for their acts.

Viewing Kentucky agency law from a different angle makes the rationale even clearer. For example, when an agency relationship does exist, a principal still will not be liable when the agent acts on purely personal motives, because the principal's "practical ability to prevent the tort will be slight." *See Patterson v. Blair,* 172 S.W.3d 361, 366 (Ky.2005) (citing William M. Landes and Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW 208-09 (1987)). This is because "it is much harder for the employer to screen and monitor employees for purely personal attitudes." *Id.* Kentucky law thus recognizes that "[t]he right to control is considered the most critical element in determining the principal's liability for the tortious acts of an agent[.]" *Taylor*, 2014 WL 2612550, at *10 (quoting *Brooks v. Grams, Inc.,* 289 S.W.3d 208, 212 (Ky. App. 2008)). There is no justification for imposing liability on the Saint Joseph for the doctors' actions when the relationship is such that the hospital has no control over the doctors' medical decisions.

The rationale becomes even stronger in a case for punitive damages, which are aimed at "punishing unlawful conduct and deterring its repetition." *Ragland v. Digiuro*, 352

S.W.3d 908, 916 (Ky. App. 2010) (citing *Gore*, 517 U.S. at 568). *How can a court punish and deter Saint Joseph for the acts of doctors it does not control?* And, the rationale is again stronger in the case of an independent contractor for medical professional services, who uses specialized skills and constant professional judgment. Indeed, part of this service may be inherently uncontrollable. The profession of medical doctor has been called a "distinct occupation": the degree of skill is "particularly high," limiting the degree of "control or supervision on the part of hospitals." *Taylor*, 2014 WL 2612550, at *10 (citing *Sam Horne Motor & Implement Co. v. Gregg,* 279 S.W.2d 755, 756–57 (Ky.1955)). The Plaintiff's nursing expert even testified that it is "ultimately the physician's responsibility" or "decision" to discharge a patient, not the nurses'. (Previous Trial Testimony Played into 2/6/12 Trial, Vol. 6 of 7, Janice Rodgers at 16:55:32-16:55:52.) But here only the nurses are under the control of Saint Joseph, not the physicians.

Saint Joseph should not have been assessed punitive damages for the acts of Drs. Parsley and Geren, who as a matter of law were found in this case not to be Saint Joseph's agents. There is no Kentucky authority for punishing a party for individuals it does not control as a matter of law, nor should any be created through this case.

2. Saint Joseph could not ratify the acts of Drs. Parsley and Geren.

Moreover, Saint Joseph could not ratify the conduct of Drs. Parsley and Geren. It is a longstanding principle of agency law that one cannot ratify an act that one does not have the capacity to authorize. *See* Restatement (Second) of Agency § 84 (1958). The Trial Court determined as a matter of law that Drs. Parsley and Geren were not agents of Saint Joseph, in part because the agreement between the doctors and Saint Joseph stated that Saint Joseph had "no control or direction over the matter, method, means, or independent medical judgment of [the doctors] in the performance of the services rendered to patients." (Agreement, ¶ 12, p.8,

RA: 1194-1207.) Without the ability to control or direct the physicians' medical judgments, a jury could not possibly find that Saint Joseph ratified the acts of the physicians.

3. EMTALA liability does not transform non-agents into agents for purposes of punitive damages.

EMTALA itself does not have a punitive damages clause; instead, it directs courts to apply the law of the state regarding damages. 42 U.S.C 1395dd(d)(2)(A). Kentucky's law on punitive damages, KRS 411.184, does not permit punitive damages for actions of independent contractors; rather, it expressly references punitive damages for the actions of only "employees" or "agents." KRS 411.184(3). If the legislature intended this statute to cover the actions of independent contractors, it could have included language to that effect. It did not. *See Smith v. Wedding*, 303 S.W.2d 322, 323 (Ky. 1957) ("It is a primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned.").

At trial, the Plaintiff argued that physicians are "deemed" agents for purposes of EMTALA. Such an argument is flawed for two reasons. First, the Plaintiff cited to no case law whatsoever for this sweeping proposition. Certain cases have held that a hospital is responsible under EMTALA for the acts of physicians who render services there. *See, e.g.*, *Roberts v. Galen of Virginia, Inc.*, 112 F.Supp.2d 638 (W.D.Ky. 2000). But, neither *Roberts* nor any other case to the undersigned's knowledge has ever deemed physicians who are independent contractors to be agents of the hospital. To the contrary, *Roberts* explained that its holding was based on the fact that "EMTALA imposes direct, rather than vicarious liability" upon hospitals for compensatory damages. *Id.* at 640. Because a hospital's liability is not based on vicarious liability, EMTALA liability does not mean any party has been "deemed" an agent; rather, there is no need to implicate agency principles in the first place.

See also Griffith v. Mt. Carmel Medical Center, 842 F. Supp. 1359, 1356 (D. Kan. 1994) (explaining that "liability under EMTALA is not grounded upon tort concepts," but is based on strict liability for harm that directly results from EMTALA violations).

Second, even assuming EMTALA deemed all physicians agents for purposes of the EMTALA violation, this would not mean the physicians are agents for purposes of punitive damages. Importantly, EMTALA itself does not have a punitive damages clause; instead, it directs courts to apply the law of the state regarding damages. 42 U.S.C 1395dd(d)(2)(A); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 944 (6th Cir. 1995) ("EMTALA allows plaintiffs to recover *any damages they are entitled to under state law* as a result of a hospital's failure to comply with EMTALA.") (emphasis added). As noted above, KRS 411.184 only allows punitive damages for "employees" or "agents"; independent contractors are conspicuously absent from the statute.

Thus, even if the Plaintiff's proposition were true, it would be limited to just what it states—that physicians are deemed agents *for purposes of EMTALA*. The Plaintiff cannot point to any case suggesting that a direct liability statute such as EMTALA exposes an entity to punitive damages for acts of individuals who are not its agents or employees. To do so would create strict liability for punitive damages, a proposition that no court has ever taken or ever should. *See Radcliff Homes, Inc. v. Jackson*, 766 S.W.2d 63, 67 (Ky. App. 1989) ("The threshold for the award of punitive damages is misconduct involving something more than merely commission of the tort[.]"). *C.f. Gore*, 517 U.S. at 574 (stating that for due process to be met, one must "receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

The jury was improperly instructed that it could consider the acts of Drs. Parsley and Geren as agents of Saint Joseph. The remedy is a new trial. CR 59.01(h); *Disabled American Veterans, Dept. of Ky., Inc., v. Crabb*, 182 S.W.3d 541, 556 (Ky. App. 2005) (stating that faulty jury instructions constitute an error of law); *Dulworth v. Hyman*, 246 S.W.2d 993, 995 (Ky. 1952) (approval of trial court's use of its discretion in granting a new trial because it committed error in giving instructions to the jury).

4. Saint Joseph's due process rights were violated by punishing it for the acts of a non-agent.

a. Saint Joseph never received fair notice that it could be punished in this manner.

Allowing the punitive damages award to stand would violate the fair notice element of due process. *Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). If Saint Joseph's punishment for the acts of Drs. Parsley and Geren is allowed to stand, this will be the first known case holding that an entity can be punished for the acts of individuals who are not its employees or agents. Saint Joseph was never provided fair notice that it could be punished in such a manner under KRS 411.184. *See Gore*, 517 U.S. at 574 n.22 ("The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against 'judgments without notice' afforded by the Due Process Clause . . . is implicated by civil *penalties*.") (citations omitted); *see also Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964) ("The [due process] violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute.") (citation omitted). This punishment without fair notice violated Saint Joseph's constitutional rights to due process.

b. Punishing a tortfeasor for acts of a non-agent is arbitrary and violates due process.

Saint Joseph's due process rights were also violated because awarding punitive damages against a party for the acts of non-agents constitutes arbitrary punishment. *See Gore*, 517 U.S. at 568; *see also Campbell*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive *or arbitrary punishments* on a tortfeasor.") (emphasis added). In determining whether punitive damages are arbitrary, the Supreme Court has looked to the scope of a state's legitimate interest in punishing and deterring future conduct. *See Gore*, 517 U.S. at 568 ("[T]he federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.").

The punitive damages award against Saint Joseph is arbitrary and excessive because it is outside of the scope of Kentucky's legitimate interest in punishing and deterring future misconduct. As noted above, there should be no interest in punishing Saint Joseph for conduct by non-agents outside of its control. In *Gore*, the Supreme Court's analysis of the excessive punitive damages award began with limiting the scope of evidence the jury should have considered in awarding the damages. *See id.* at 574 ("When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent . . . that this award is grossly excessive.). The trial court had impermissibly allowed the jury to consider evidence of conduct in other jurisdictions in awarding a higher punitive damages award. *See id.* at 573-74. In the same vein, the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* found arbitrariness when the trial court had allowed the temporal scope of the case to be enlarged for considering punitive damages. *Campbell*, 538 U.S. at 424 ("The reprehensibility guidepost does not permit courts

to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20–year period[.]").

In this case, the Trial Court impermissibly expanded the scope when it allowed the jury to consider acts of different *persons*—non-agent doctors—in assessing punitive damages for Saint Joseph. This is analogous to the arbitrariness ultimately held unconstitutional in *Gore* and *Campbell*. The Supreme Court has explained that concerns over arbitrary or excessive punitive damages "are heightened *when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded.*" *Campbell*, 538 U.S. at 418 (emphasis added). Likewise, the instructions in this case had little bearing on the punitive damages that should have been awarded, as they impermissibly included persons whose conduct should not have been considered. Therefore, there was no relation to Kentucky's interest in punishment or deterrence, and the result was arbitrary, excessive, and unconstitutional.

B. THE "SLEEPING JUROR" – SAINT JOSEPH WAS DEPRIVED OF ITS RIGHT TO A FAIR TRIAL.

This issue was preserved at trial when Saint Joseph moved the Trial Court to remove Juror 4642 for cause before deliberations began, (22/4/12/CD/24-23 at 4:06:48), and moved the Trial Court for a new trial on the grounds of juror misconduct. (RA: 3859-3885.)

During trial, it became apparent to the parties and the Trial Court that Juror 4642 was sleeping through significant portions of testimony. Importantly, it was the Trial Court that brought this issue up based on its own observations. (22/4/12/CD/24-15 at 1:33:24.) Saint Joseph also moved the Trial Court to remove Juror 4642 for cause before deliberations began. (22/4/12/CD/24-23 at 4:06:48.) Such a process is proper and has been sanctioned by this Court. *See e.g.*, *Lester v. Commonwealth*, 132 S.W.3d 857, 863 (Ky. 2004) ("the law is

clear that a trial court may remove a juror for cause at the conclusion of the evidence as an alternate juror without violating [CR 47.02]"). The Trial Court overruled the motion and included the juror in the pool for random selection of the alternate jurors. (22/4/12/CD/24-23 at 4:10:13.)

On February 21, 2012, the Trial Court summoned counsel to the bench and raised the issue, describing Juror 4642's sleeping as "constant." (22/4/12/CD/24-15 at 1:33:24.) Counsel for Plaintiff admitted that he had seen the juror "nod" "a couple times" as well. (*Id.*) The issue continued the remainder of the trial, with Juror 4642 sleeping through key portions of Saint Joseph's proof. The problem was so significant that the Trial Court stopped live testimony by Saint Joseph's expert in emergency medicine and noted to counsel that Juror 4642 had "passed out."[13] (22/4/12/CD/24-19 at 3:13:54.) In discussions regarding Juror 4642, the Court even referred to him as the "sleeping juror." (22/4/12/CD/24-23 at 4:16:40.) The problem continued in deliberations, as Juror 4642 was 45 minutes late on the second day of deliberations because he overslept. (22/4/12/CD/24-24 at 9:46:40.)

The Trial Court itself even acknowledged that leaving Juror 4642 on the panel was not the right decision. During the bench conference regarding the selection of the alternate juror, the Trial Court stated that it was "much to [its] chagrin" that Juror 4642 was not selected. (22/4/12/CD/24-23 at 4:16:40.) After the verdict, Saint Joseph moved for a New Trial on grounds of juror misconduct. Despite making observations on the record regarding Juror 4642's sleeping during trial, the Trial Court took the remarkable position that the juror

---

[13] It is significant that the *trial court* chose these words to describe the juror. To "pass out" is commonly used, and formally defined, as "to lose consciousness." "Pass out," MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/pass%20out (last visited October 27, 2014). This shows, from an objective source, that juror 4642 was doing far more than just nodding off during trial.

could have "acted as if he were sleeping," and stated that the Trial Court "didn't ask whether he was or he wasn't." (12/4/12/CD/73 at 4:15:23.)

"In [the case of a juror sleeping on the panel], *a juror's inattentiveness is a form of juror misconduct*, which may prejudice the defendant and require the granting of a new trial." *Lester*, 132 S.W.3d at 862 (emphasis added). The problem this Court identified in *Lester* is exactly what occurred here. Juror 4642 slept through key defense witnesses and by doing so committed a form of juror misconduct. Juror 4642 did not just close his eyes during a brief portion of video testimony on an isolated occasion. He slept repeatedly and "passed out" during the live testimony of Saint Joseph's expert in emergency medicine. Sleeping through such key testimony is far beyond the slight inattentiveness that would fall within a trial court's discretion to allow.

Other states also recognize juror inattentiveness as grounds for a new trial. In *Dimas-Martinez v. State*, the Supreme Court of Arkansas reversed a conviction because a trial court abused its discretion by not removing a juror who had slept for five minutes. *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011). In that case, the trial court apparently relied on the juror's assertion that he did not miss much in the five minutes he fell asleep, but the Arkansas Supreme Court rejected the trial court's decision to leave the juror on the panel. Other courts have acknowledged the inherent problems with merely tired jurors—not just in assessing proof during trial, but in the preliminary process of selecting a jury. *State v. Allen*, 800 So.2d 378, 386 (La. App. 2001) (reversing conviction and ordering new trial).

The Plaintiff has argued that Juror 4642's misconduct does not warrant a new trial because Saint Joseph was not prejudiced, but Kentucky law does not require a party to establish prejudice in these circumstances. *Olympic Realty Co. v. Kamer*, 141 S.W.2d 293,

297 (Ky. 1940) ("[T]he fact that a juror disqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that that fact accounts for the verdict."). Instead, the primary question is whether Saint Joseph was granted a fair trial. *See* Ky. Const. § 7 ("The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."). "[T]he right to reject jurors . . . is material in its tendency to give the parties assurance of the fairness of a trial in a valuable and effective way." *Kamer*, 141 S.W.2d at 297. Therefore, under Kentucky law, if a juror who should have been disqualified sits on the jury panel, it is grounds for a new trial. *Id.* "[T]he question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established." *Id.* When a juror who should have been disqualified sits on a panel, the parties are denied the opportunity to have their case heard by a full panel. KRS 29A.280 ("Juries for all trials in Circuit Court *shall* be composed of twelve (12) persons.") (emphasis added).

As the right to a fair trial itself is what is at stake, this Court has repeatedly warned lower courts to err on the side of caution in juror selection, striking the juror in question if there is any doubt. *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013) (noting "the paramount importance of jury selection and [the Court's] concern that trial courts continue to demonstrate reluctance to excuse problematic jurors"). This Court made its instructions clear in *Ordway* and noted that it had done so for years in a series of cases dating to 2007, well before the trial in this case. *Id.* While *Ordway* involved a biased juror, the analysis should be no different for juror misconduct. *See, e.g.*, *Nunley v. Commonwealth*, 393 S.W.3d 9, 13-14 (Ky. 2013) (citing *Ordway* and applying same analysis when question of juror conduct arises

after panel has been seated). Trial courts should not "inexplicably put at risk not only the resources of the Court of Justice, but the fundamentally fair trial they are honor-bound to provide." *Nunley*, 393 S.W.3d at 13-14. This Court has continually made clear that trial courts should "tend toward exclusion" rather than inclusion and that "in marginal cases, the questionable juror should be excused." *Id.*

This Court has also "repeatedly held that false answers given by jurors during voir dire, even when that fact is not discovered until after trial, raise substantial constitutional issues." *Sluss v. Commonwealth*, 381 S.W.3d 215, 225 (Ky. 2012). In *Sluss*, this Court remanded the case for the trial court to determine whether the jurors' "answers during voir dire were false and whether they should have been struck for cause." *Id.* at 229. The Court held that if the trial court found that the jurors "should have been struck for cause, it shall enter an order granting a new trial pursuant to RCr 10.02." *Id.* Here, the Trial Court found that Juror 4642 worked third shift throughout trial, but failed to respond to a direct question asking whether he would be. (22/4/12/CD/24-15 at 1:33:24.) Therefore, Juror 4642's false answer alone establishes that Saint Joseph should be granted a new trial.

"[I]f a juror falls within a gray area, he should be stricken." *Id.* Yet the Trial Court here ignored this Court's series of admonitions and allowed Juror 4642 to sit on the jury. The Court of Appeals acknowledged that the trial court's decision was not the proper one, but refused to order a new trial. (2013 Opinion at 22) ("While it may have been a better course for the trial court to designate Juror 4642 as the alternate, we cannot say that the trial court abused its discretion by denying the motion to excuse the juror.") A fair trial and a properly established tribunal in itself are the requirements under Kentucky law. The Trial Court

abused its discretion by allowing a juror who was "passed out" during crucial portions of Saint Joseph's case to deliberate. Saint Joseph is therefore entitled to a new trial.

C. THE PUNITIVE DAMAGES AWARD IS CLEARLY EXCESSIVE AND DEPRIVES SAINT JOSEPH OF CONSTITUTIONAL DUE PROCESS.

The initial punitive damages award of $1,500,000, a 400 to 1 ratio when compared to compensatory damages, was set aside by the Court of Appeals as clearly excessive. The new award of $1,450,000, a 387 to 1 ratio, was no different. It cannot pass Constitutional muster and also must be set aside. This Court's obligation is to review the award *de novo*:

> The procedural standard of review for such a constitutional challenge was established in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); review is de novo. The Supreme Court reasoned that, "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, ... the level of punitive damages is not really a 'fact' 'tried' by the jury." *Cooper Industries*, 532 U.S. at 437, 121 S.Ct. at 1686 (citations omitted). Historically, as the function of exemplary damages became less compensatory and more punitive and deterrent, and as the analysis shifted from fact-based to law-based, the States' interests in punishment and deterrence came to play the greater role. Furthermore, "'*de novo* review tends to unify precedent' and 'stabilize the law.'" *Cooper Industries*, 532 U.S. at 436, 121 S.Ct. at 1685 (quoting *Ornelas v. U.S.*, 517 U.S. 690, 697-98, 116 S.Ct. 1657, 1632, 134 L.Ed.2d 911 (1996)). For these and other reasons, constitutional challenges are reviewed *de novo*.

Ragland v. Digiuro, 352 S.W.3d at 916-917. Accordingly, this Court should give no deference to the jury or the Trial Court. In the present case, there are even more compelling reasons for this Court to conduct its own independent review. The Trial Court engaged in no meaningful post-trial review, refusing to even undertake the basic *Gore/Campbell* analysis. (12/4/12/CD/73 at 4:20:20.)

In its 2013 Opinion, the Court of Appeals also failed to provide any meaningful review, largely ignoring the thorough analysis undertaken in the 2008 Opinion. It made no mention of the findings that the prior jury "apportioned 25% of the fault to Gray himself, thus diminishing Saint Joseph's overall responsibility for the injury," (*see* 2008 Opinion at 33); that the alleged impropriety here occurred once, compared with numerous previous times that Saint Joseph had cared for Mr. Gray (*Id.* at 33) ("[T]he Hospital's conduct over April 8-9, 1999, involved a discrete time period and there is no evidence it engaged in an ongoing course of conduct."); or that the compensatory award was not a nominal amount that might allow for higher ratios (*Id.* at 34). Rather, the 2013 panel undertook a new analysis without explaining how a 387 to 1 punitive damages award was any different than a 400 to 1 punitive damages award based on the same conduct and the same evidence.[14]

Due process requires procedural safeguards against excessive verdicts both before a verdict via proper jury instructions *and* after the verdict via meaningful post-trial review. *See e.g., Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18-24, 111 S.Ct. 1033, 1043-1046 (1991). "Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Campbell*, 538 U.S. at 418 (internal quotations omitted). The United States Supreme Court has consistently held that post-verdict review is essential to due process. *See e.g., Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 421, 114 S. Ct. 2331, 2335 (1994) ("Judicial review of the size of punitive

---

[14] Due to the unavailability of witnesses, the vast majority of Plaintiff's case, including all of Plaintiff's expert medical proof, was presented through video testimony from the 2005 trial.

Judge Nickell appropriately noted in his dissent that the Court's review is subsequent to and separate from the jury award. (2013 Opinion at 33) ("However, the question remains as to whether the current jury's award of punitive damages against the Hospital is constitutionally excessive and contrary to federal due process.") Analyzing several cases with reprehensible conduct, including the *Ragland* case involving the most reprehensible conduct imaginable, Judge Nickell noted that even those cases would not support a nearly 400 to 1 ratio. (2013 Opinion at 34-36). Instead, he found that "[c]onsistent application of the law" compelled a finding that the award here was constitutionally excessive. (*Id.* at 32, 36).

damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.").

The Trial Court refused to undertake any post-trial review, and the Court of Appeals erred in its review, stating that the United States Supreme Court has provided "little clear guidance in deciding whether to uphold an award of punitive damages in a particular case." (2013 Opinion, at 31.) During the hearing on Saint Joseph's post-trial motions, the Trial Court explained that because it thought the instructions were proper, the Trial Court did not know whether it even "needs to go through the *Gore* analysis or the *Campbell* analysis with respect to going through the guideposts." (12/4/12/CD/73 at 4:19:46.) The Trial Court in fact did not go through the guideposts of *Gore* and *Campbell*, instead emphasizing that the jury made its decision with proper jury instructions. (*Id.* at 4:24:23.) It stated that it was "at a loss" for how to apply the *Gore/Campbell* analysis and expressed its desire to instead have the appellate courts "say what they think it is." (*Id.* at 4:34:50.) The Trial Court even explained that the Court of Appeals "probably will" say the ratio is "absolutely unreasonable under the circumstances of this case." (*Id.* at 4:46:23.)

The Court of Appeals' review was also flawed, as it improperly gave deference to the jury finding rather than undertaking a separate *de novo* review. While the Court of Appeals' review was labeled *de novo*, it instead reads much more like a sufficiency of evidence standard, giving great deference to the jury's findings. (2013 Opinion at 26, 32) ("[T]he jury clearly found that aggravating conduct by the Hospital's staff outweighed any mitigating factors.") ("The fact that two separate juries came to such similar conclusions indicates that the jury gave significant weight to this factor."). *But see Ragland*, 352 S.W.3d at 916-917

(Ky. App. 2010) ("[T]he level of punitive damages is not really a 'fact' 'tried' by the jury." (citing *Cooper Industries*, 532 U.S. at 437)).

In contrast, there is ample case law on the constitutional requirements for punitive damages awards. The Trial Court and the Court of Appeals were required to provide their own meaningful post-trial review of the award, rather than defer to the jury or focus on whether the jury instructions were proper. This Court, reviewing the award *de novo*, should provide that judicial review and set aside this award.

1. The award violates constitutional due process as stated in *Gore* and *Campbell.*

As a matter of due process, punitive damages must bear a reasonable relationship to compensatory damages. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 448 (2001); *Gore*, 517 U.S. at 580. The *Gore* analysis is "the *substantive* standard" this Court must apply in its *de novo* review for constitutionality. *See Ragland*, 352 S.W.3d at 917 (citing *Cooper Industries, Inc.*, 532 U.S. at 448) (emphasis in original).

In *Gore*, the Supreme Court set forth three factors, or "guideposts," which reviewing courts must consider. These factors are, "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in similar cases." *Campbell*, 538 U.S. at 409 (*citing Gore*, 517 U.S. at 575).

a. The First Guidepost – Degree of "Reprehensibility"

The first guidepost, the degree of reprehensibility of a defendant's conduct, is "the most important indicium of a punitive damages award's reasonableness." *Campbell*, 538 U.S. at 409. "[A] court must consider whether: the harm was physical rather than economic; the

tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 409 (*citing Gore*, 517 U.S. at 576-577). Moreover, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

Here, the only one of these factors that could arguably weigh in the Plaintiff's favor is the fact that the Plaintiff's harm was physical rather than economic. The Court of Appeals has at least once commented on the reprehensibility factor in this case and held that it could not sustain such a large award. (2008 Opinion at 33-34). As the 2008 Opinion noted, the prior jury "apportioned 25% of the fault to Gray himself, thus diminishing Saint Joseph's overall responsibility for the injury." (2008 Opinion at 33.) It is also of critical note that Plaintiff's counsel intentionally withdrew the wrongful death claim. Thus, the only harm for the jury to consider was pain and suffering for no more than ten to twelve hours, during which time Mr. Gray was on multiple pain relievers both prescribed and not prescribed.

One of the key factors in the "reprehensibility" guidepost is whether the conduct in question was repeated or an isolated event. The alleged improper conduct here is not like the conduct in *Clark v. Chrysler Corporation*, 436 F.3d 594 (6th Cir. 2006), where the defendant knew about an unsafe design for four decades. Rather, as the 2008 Court of Appeals panel noted, the alleged impropriety here occurred once, compared with numerous previous times that Saint Joseph had cared for Mr. Gray. *See* 2008 Opinion at 33 ("[T]he Hospital's conduct over April 8-9, 1999, involved a discrete time period and there is no evidence it engaged in an ongoing course of conduct."). In addition, Saint Joseph assisted Mr. Gray in

finding shelter, transportation, and in filling his prescriptions when his own family would not assist him. These efforts do not evidence the type of repeated or reprehensive conduct to justify punitive damages.

Assuming there is even any reprehensible conduct at all, courts have noted the judiciary's task of keeping "the reprehensibility of [the punitive damages] case in proper perspective." *See Ragland*, 352 S.W.3d at 918; *Gore* at 517 ("[S]ome wrongs are more blameworthy than others."). *Ragland* decreased an 18 to 1 punitive damages award in a case where the defendant's "purpose was to kill" the plaintiff—the result of "intentional malice and no mere accident." *Id.* When one considers the degree of harm to Mr. Gray and Saint Joseph's acts in *caring for* him on many occasions, especially with prior judicial measures of "reprehensibility" in perspective,[15] the first *Gore* guidepost weighs in favor of Saint Joseph and cannot justify a punitive damages award so vastly disproportionate.

b. The Second Guidepost – Ratio Test

The second *Gore* guidepost is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Campbell*, 538 U.S. at 409 (*citing Gore*, 517 U.S. at 575). Admittedly, there is not one simple mathematical ratio that yields an unconstitutional punitive damages award. However, the Supreme Court has offered guidance, both mathematical and non-mathematical, on what type of award is reasonable. *See Ragland*, 352 S.W.3d at 919.

The ratio in this case is 386 to 1. *Ragland* surveyed cases applying the ratio test, pointing out the "breathtaking 500 to 1" ratio reversed in *Gore*, the 90 to 1 ratio of *Cooper Industries* (remanded for *de novo* review), and the 18 to 1 ratio *Ragland* itself ultimately held

---

[15] *See, e.g., Clark v. Chrysler Corporation*, 436 F.3d 594 (6th Cir. 2006); *Ragland*, 352 S.W.3d at 918.

unconstitutional. *Id.* at 920. In its analysis, the court highlighted that the Supreme Court in *Gore* recognized that a 4 to 1 ratio approaches the line of unconstitutionality. *Id.* (citing *Gore*, 517 U.S. at 581); *Clark*, 436 F.3d at 606 ("Although the Supreme Court has not identified a concrete ratio, it has emphasized that 'an award of *four times* the amount of compensatory damages might be *close to the line of constitutional impropriety.*'" (*citing Campbell*, 538 U.S. at 425)) (emphasis added).

In fact, the Supreme Court has stated that, "in practice, *few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.*" *Campbell*, 538 U.S. at 410 (*citing Gore*, 517 U.S. at 581) (emphasis added). If a punitive damages award of four times the compensatory damages is "close to the line of constitutional impropriety," then an award of almost four *hundred* times that amount most certainly crosses far beyond that line. "[G]iven the enormous disparity between the compensatory and punitive damages," as the Court of Appeals called it in its 2008 Opinion, this Court should hold the punitive damages award against Saint Joseph clearly excessive. 2008 Opinion at 34.

In *Campbell*, the Supreme Court began its analysis of a punitive damages award of 145 to 1 by stating that it was presumptively unconstitutional and concluded by finding the award far excessive and in violation of the Due Process clause. *Campbell*, 538 U.S. at 540. Here, the compensatory damages for which the jury found Saint Joseph liable amounted to $3,750, yet the punitive damage award was $1,450,000.[16] This means that the ratio in this case is ***386*** to 1.

---

[16] Only the amount actually apportioned to the Hospital may be considered in terms of the ratio of punitive damages. "We use this reduced amount to determine the appropriate ratio because a ratio based on the full compensatory award would improperly punish [the Defendant] for conduct that the jury determined to be the fault of the plaintiff." *Clark v. Chrysler Corporation*, 436 F.3d 594 (6th Cir. 2006).

Even the most casual reading of U.S. Supreme Court, Sixth Circuit, and Kentucky case law reveals that a punitive damage award of 386 to 1 is presumptively unconstitutional. *Campbell*, 538 U.S. at 426 ("In the context of this case, *we have no doubt that there is a presumption against an award that has a 145-to-1 ratio.*") (emphasis added.); *see also id.* at 425 (referencing a "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1.") (internal quotations omitted).

These observations by the Supreme Court are not suggestions; they are "the *substantive* standard" of whether a punitive damages award complies with due process. *See Ragland*, 352 S.W.3d at 917 (citing *Cooper Industries, Inc.*, 532 U.S. at 448) (emphasis in original). As the 386 to 1 award is clearly outside of these constitutional parameters, with no legal justification or exception, it should be set aside as unconstitutional.

c. The Third Guidepost – Civil Penalties

The third *Gore* guidepost requires a comparison of the punitive damage award with the civil or criminal penalties for comparable alleged misconduct. In making this comparison, a reviewing court "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583.

The Court here must look to the civil penalties that are available under EMTALA. Subsection (d)(1)(A) of EMTALA states, "A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000." The Court of Appeals has once rejected the prior award that was thirty times greater than EMTALA's civil penalty as being another factor bolstering the fact that the award is

excessive. 2008 Opinion at 34. Other courts have rejected a 3.75 to 1 ratio between the maximum codified civil penalty and the punitive damage award as improperly disproportionate. *Clark*, 436 F.3d at 607-08. The current award yields a *twenty-nine* to one ratio between the punitive damages and the codified civil penalty, which far exceeds a reasonable relationship to the civil penalties.

2. The nominal damages exception does not apply to this case.

The Plaintiff may argue that a higher punitive damage award is justified because the amount of compensatory damages was small. However, as the 2008 panel recognized, the compensatory damages here were "more than nominal," and the "enormous disparity" between the compensatory and punitive damages remains a significant issue. 2008 Opinion at 24. The Supreme Court has noted two examples in which low compensatory damages and higher ratios may be acceptable: cases involving "particularly egregious" acts resulting in only a small amount of economic damages, and cases in which "the injury is hard to detect" or "the monetary value of noneconomic harm might have been difficult to determine." *See Gore*, 517 U.S. at 582.

First, there was no "particularly egregious" conduct by Saint Joseph that would allow for such an enormous disparity in awards. *See, e.g.*, *Ragland*, 352 S.W.3d at 918 (remitting 18 to 1 punitive damages award in a case even though the defendant killed plaintiff out of "intentional malice"). Second, this was not a case in which compensatory damages were hard to detect. Rather, the low compensatory damages against Saint Joseph were a result of the Plaintiff's litigation decision of intentionally withdrawing the wrongful death claim. Even if the Plaintiff had not withdrawn the wrongful death claim, further noneconomic harm would still not have been compensable. *See Ragland*, 352 S.W.3d at 921 ("Damages in the wrongful death statute compensate for loss of the deceased's earning power and do not

include the affliction to the family as a result of the wrongful death." (quoting *Giuliani v. Guiler,* 951 S.W.2d 318, 322 (Ky.1997))).

Finally, the low compensatory damages were a result of the comparative fault doctrine. The jury assigned 85% of the fault to parties other than Saint Joseph; 25% fault was assigned to Mr. Gray himself. *See* 2008 Opinion at 33. Those findings are not the type that would allow for one of the few awards that might exceed a single digit ratio. *See McDonald's Corp. v. Ogburn*, 309 S.W.3d 274, 301 (Ky. App. 2009). Consequently, no exceptions to the general prohibition against high ratios are applicable. *See Ragland*, 352 S.W.3d at 921.

III. ALTERNATIVELY, THIS COURT SHOULD REMIT THE AWARD TO AN AMOUNT BEARING A REASONABLE RELATIONSHIP TO COMPENSATORY DAMAGES.

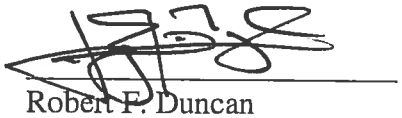
Should this Court find that Saint Joseph is only entitled to a new trial due to the award's excessiveness, the Court should follow those constitutional parameters and remit the award. Due to the long procedural history of this case, the Trial Court's concession that it does not know what to do, and because the review of any action by the Trial Court on remand would be reviewed *de novo* on any subsequent appeal, it is in the best interest of both parties that this Court remit the award at this juncture rather than revisiting this issue again years from now after a remand. In doing so, the Court should consider remitting the award to an amount in line with the 4 to 1 ratio set forth in *Gore*, the single digit ratio suggested in *Campbell* (or Judge Nickell's dissent), or should the court feel compelled to award an amount higher than that, at most an award reflecting the EMTALA civil penalty of $50,000.00.

CONCLUSION

Saint Joseph respectfully requests that the Court enter judgment as a matter of law on the grounds of insufficiency of evidence of gross negligence or ratification, or in the

alternative a new trial based on improper instructions, juror misconduct, and the excessiveness of the award. Should this Court find that Saint Joseph is not entitled to judgment and is solely entitled to a new trial based upon the excessiveness of the award, Saint Joseph respectfully requests that this Court remit the award to an amount bearing a reasonable relationship to compensatory damages in compliance with the *Gore/Campbell* guideposts so that this case, after three trials and three appeals, may finally come to an end.

Respectfully submitted,



Robert F. Duncan
Jay E. Ingle
Patrick F. Estill
Jackson Kelly PLLC
175 East Main Street, Suite 500
Lexington, KY 40507
(859) 255-9500